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Transmitted Electronically
To whcnaa@bia.gov

September 29, 2023

Anthony Rodman
Executive Director
White House Council on Native American Affairs
1849 C St, NW
Washington DC 20240

Dear Executive Director Rodman,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the White House Council on Native American Affairs' (WHCNAA) draft "Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites" (Draft Guide on Sacred Sites). The Draft Guide on Sacred Sites identifies best practices for federal agencies to improve consultation, co-stewardship, Tribal Nation capacity building, access to and protection of sacred sites, confidentiality, training for federal employees, and public outreach. The Draft Guide on Sacred Sites aims to assist WHCNAA participating agencies and other federal agencies in improving federal policies related to sacred sites and to integrate consideration of issues related to sacred sites and Indigenous Knowledge into each agency's consultation procedures and decision-making efforts. USET SPF's comments express general support and additional recommendations for the Draft Guide on Sacred Sites. Our additional recommendations address the need for comprehensive training for federal employees on U.S.-Tribal Nation relations, technical assistance support and funding, acknowledging Tribal reserved rights, educating public and state entities about sacred sites, and concerns regarding Freedom of Information Act (FOIA) requests.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

⁽¹⁾ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

General Support and Additional Recommendations for WHCNA's Draft Guide on Sacred Sites Best Practices

USET SPF generally supports the contents of the Draft Guide on Sacred Sites. The current draft provides a good initial introduction for federal staff, contractors, and others on the unique legal and political status of Tribal Nations, the nature of federal trust and treaty obligations to Tribal Nations and our reserved rights, explanations of what a sacred site and Indigenous Knowledge are, the roll of co-stewardship agreements, and best practices to protect sacred sites as well as how to safeguard Indigenous Knowledge from public dissemination. USET SPF strongly recommends that, once finalized, the WHCNA members and the eight federal agency participants of the, "MOU Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites" (Sacred Sites MOU participating agencies), transmit the Guide to the Office of Management and Budget (OMB). Further, WHCNA and the Sacred Sites MOU participating agencies should request that OMB issue a Memorandum to all heads of federal departments to follow the Guide and integrate it into agency education and training modules for federal employees and contractors and integrate it into agency decision-making processes.

However, before the Draft Guide on Sacred Sites can be finalized, USET SPF offers the following recommendations and additional information for consideration and inclusion in revising the current draft—

- **Require federal employees and contractors receive education and training on Tribal sovereignty and U.S.-Tribal Nation Relations.** Before federal agencies, employees, and contractors can effectively implement best practices for the protection of sacred sites and Indigenous Knowledge, comprehensive training on working with and communicating effectively with Tribal Nations is required. Effective and transparent communication, as well as a clear understanding of the federal government's trust and treaty obligations to Tribal Nations, are essential, core components that should influence and guide federal decision-making processes. Federal employees and contractors must understand that federal actions have direct and indirect impacts and consequences on sacred sites and the cultural and public health well-being of Tribal Nations and our citizens. Many federal employees and contractors are engaged in decision-making that will impact and affect our historic, cultural, and natural resources. Therefore, it is important that these federal employees and contractors fully understand the history of U.S.-Tribal Nation relations and the federal trust obligation.

The lack of education and understanding regarding trust and treaty obligations has and continues to contribute, at least in part, to federal failures to properly consult with Tribal Nations. USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees, and, by extension, federal contractors hired to perform certain duties. The federal government must require its employees and hired contractors to receive training to become knowledgeable of the federal government's obligations to promote Tribal sovereignty and self-determination, regardless of the level their position interacts with Tribal Nations. This training should be designed in consultation with Tribal Nations and updated and revised as appropriate in response to 'lessons learned'. Further, we recommend that references to federal trust responsibilities in the Draft Guide on Sacred Sites should be revised to acknowledge federal trust and treaty obligations in recognition of the federal government's legally binding obligations to Tribal Nations and our citizens.

- **Federal agencies must prioritize technical assistance funding to Tribal Nations.** USET SPF appreciates inclusion of language in the Draft Guide on Sacred Sites under Sec. 2 of the "Best

Practices for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites”. The draft language acknowledges that many Tribal Nations operate with limited resources and dedicated personnel to participate in consultations with federal agencies on proposed federal actions that may include or be relevant to Tribal sacred sites. Limited federal resources to hire dedicated personnel hinders the ability of Tribal Nations to adequately participate in consultations on authorities referenced under Sec. 3 of the Draft Guide on Sacred Sites’ Appendices. These include participation in environmental review processes under the National Environmental Protection Act (NEPA), review of federal actions that may affect Tribal cultural and historic sites under Sec. 106 of the National Historic Preservation Act (NHPA), and the repatriation of ancestral remains and items of cultural patrimony under the Native American Graves and Repatriation Act (NAGPRA), among other authorities. USET SPF supports the Draft Guide on Sacred Sites’ language recommending that federal agencies—when preparing annual budgetary requests—consider requesting direct and contract funding to Tribal Nations for consultation-related costs and staff training. This language should be expanded to include requests for funds for Tribal Nations to hire the necessary personnel required to participate in consultations and review of documents associated with the authorities detailed under Sec. 3 of the Draft Guide on Sacred Sites’ Appendices. Appropriations to support environmental, historic, and cultural review processes under the National Environmental Policy Act and Sec. 106 of the National Historic Preservation Act have never been funded at appropriate levels to fully staff and provide resources to Tribal Nations to adequately participate in these processes.

The Draft Guide on Sacred Sites should also recommend that, in lieu of dedicated appropriations, federal agencies identify additional agency resources to provide technical assistance and staffing support to Tribal Nations for environmental, cultural, and historic preservation reviews and to participate in other processes required by the authorities detailed under Sec. 3 of the Draft Guide on Sacred Sites’ Appendices. For example, not all Tribal Nations have Tribal Historic Preservation Officers (THPOs) dedicated to these review processes due to funding limitations and shortfalls. In the instances that Tribal Nations have a THPO and/or cultural or natural resources department dedicated to conducting environmental, cultural, and historic preservation reviews, oftentimes these individuals and departments are inundated with multiple projects and permit applications that exceed their available capacity and resources. Review of these projects can also be lengthy because they are often broken into multiple, segmented reviews of a single project and span across multiple federal and state agency jurisdictions and oversight. Furthermore, these individuals and departmental staff may fulfill multiple roles within Tribal government due to historic and persistent funding shortfalls for these positions. It is not uncommon for a cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role.

- **Protect sensitive Tribal information and Indigenous Knowledge from FOIA requests and do not permit interagency sharing of Tribal information and Indigenous Knowledge without Tribal consent.** USET SPF appreciates WHCNA’s initial approach in the Draft Guide on Sacred Sites to address longstanding issues Tribal Nations have concerning FOIA requests. Tribal Nations are best positioned to identify what types of our Indigenous Knowledge sets are sensitive or sacred and should be protected from public dissemination. In November 2022, CEQ, in coordination and collaboration with the White House Office of Science and Technology Policy (OSTP), issued a “Guidance Memorandum for Federal Departments and Agencies on Indigenous Knowledge” (Guidance on IK). CEQ and OSTP’s 2022 Guidance on IK instructs federal agencies to, “...consult with Federal agency legal counsel regarding the agency’s obligations under the [FOIA] and other public disclosure laws, and legal authorities that may apply to inclusion of Indigenous Knowledge.”

USET SPF supports the language included in the Draft Guide on Sacred Sites regarding FOIA under Sec. (4)(c) of the “Best Practices for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites”, especially providing an example of how FOIA Exemption 3 could be used by federal agencies to safeguard sensitive Tribal information and Indigenous Knowledge. However, recognizing that not all sensitive Indigenous Knowledge falls within Exemption 3 or any other FOIA exemption or exclusion, USET SPF supports WHCNA’s Draft Guide on Sacred Sites suggestion that:

“Prior to gathering information from [Tribal Nations], federal agencies should consult with their attorneys for advice on what records may be required to be disclosed under FOIA and what legal protections might exist to withhold or protect sensitive information. It is imperative that federal agencies be forthright with [Tribal Nations] about the potential for disclosure of sensitive Indigenous Knowledge under FOIA and make these risks clear well in advance.

USET SPF has noticed that WHCNA and some federal agencies have included written disclaimers in Dear Tribal Leader Letters announcing scheduled Tribal consultations and verbal disclaimers during a consultation session stating, “please note that information shared during this consultation may be subject to disclosure under the [FOIA].” Until Congress enacts legislation that expressly protects sensitive Tribal information and Indigenous Knowledge from public dissemination through FOIA requests, we strongly support WHCNA’s proposed language in the Draft Guide on Sacred Sites for best practices for safeguarding sensitive Tribal information and Indigenous Knowledge on sacred sites. Further, USET SPF strongly urges that this language be expanded upon to include language that federal agencies receiving Indigenous Knowledge from Tribal Nations should not share this information with other federal agencies in the absence of express Tribal Nation consent. Additional language should be included stating that federal agencies that receive inquiries or requests for the sharing of Indigenous Knowledge from other federal agencies should also inform the respective Tribal Nation regarding these requests. We should be the sole determiners regarding whether this information should be shared or withheld.

Moving forward, WHCNA should work with OMB to develop guidance for federal agencies on how FOIA requests on our information should be handled regarding Indigenous Knowledge. First and foremost, during the exchange of Indigenous Knowledge and other sensitive Tribal cultural information, federal agencies should actively work with Tribal Leaders to determine what information should be redacted from public dissemination and protected from FOIA requests. Furthermore, federal agencies must inform Tribal Nations when FOIA requests are made to access our information and let us determine whether such requests should be withheld or redacted. Similarly, federal agencies must inform Tribal Nations when the agency receives these requests, what entity is requesting information, and the information being requested. Tribal Leaders, Tribal Historic Preservation Officers, and other individuals we expressly identify, such as our recognized cultural/spiritual leaders, should be recognized as authorities to claim what Indigenous Knowledge and cultural information should be withheld or redacted from public dissemination. Additionally, we should also be the sole and final arbiters in identifying what constitutes Indigenous Knowledge—not the federal government.

Finally, WHCNA should include language that federal agencies must work with Tribal Leaders to ensure that the recording, taking of notes, or direct transcription of a consultation by machine or other methods does not create a record of sensitive Indigenous Knowledge and cultural information that could potentially be disseminated to or accessed by the public. During consultation sessions, we should be notified of any recording and transcription methods being used. Additionally, federal

agencies must adhere to any objections of the recording or transcription of any Indigenous Knowledge or cultural information divulged during consultation. Furthermore, requests for the redaction of sensitive Indigenous Knowledge and cultural information should be allowed to be stated verbally during consultation sessions and in any follow-up written, or otherwise documented, materials submitted to federal agencies.

- **WHCNA should expand upon language in the Draft Guide on Sacred Sites acknowledging that Tribal treaty rights are analogous to Tribal reserved rights.** It is important to make the distinction that trust obligations extend beyond those agreed upon provisions of treaties between Tribal Nations and the United States. While treaties are critically important to uphold and the law of the land, it is important that WHCNA account for the fact that not all Tribal Nations have treaties with the United States. When the federal government recognizes a Tribal Nation, it commits to, among other things, treating that Tribal Nation just as it would any other, including as it delivers upon trust and treaty obligations to protect our sacred and cultural sites. The federal government must acknowledge that the term Tribal reserved rights encompass those rights that have been explicitly reserved through treaties, statutes, and Executive Orders. Federal agencies must recognize that Tribal Nation exercise these reserved rights to protect our natural environments, resources, sacred, cultural, and historic sites, lifeways, and the public safety and health of our communities and citizens. These Tribal reserved rights must be interpreted for the benefit of Tribal Nations, with any ambiguities resolved in our favor. Moving forward WHCNA should include language that acknowledges and explains that Tribal reserved rights include those rights that have been explicitly reserved through treaties, statutes, and Executive Orders.
- **Additional clarification should be provided in the Draft Guide on Sacred Sites to educate the public and state entities on federal policies to protect sacred sites.** In the Draft Guide on Sacred Sites under Sec. 6 of the “Best Practices for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites”, WHCNA has included language for federal agencies to consider in educating the public about sacred sites. USET SPF recommends additional language that includes the responsibilities state agencies have assumed in this process because of enactment of certain statutes by Congress. Ideally, due to the Nation-to-Nation diplomatic relationship that exists between Tribal Nations and the federal government, we strongly prefer direct management/oversight by Tribal Nations for the protection of sacred sites. However, since certain laws have unfortunately granted state jurisdictional authorities over certain lands, the federal government must educate and inform its agency staff of this and seek to educate state entities on the importance of collaborating with Tribal Nations to protect areas of sacred and cultural significance. Moving forward, WHCNA should consider to what extent the federal government is directing state governments to comply with federal policies and laws for the protection of sacred sites. Additionally, it should consider how the federal government, is or will, hold states accountable to these policies and laws. This should also apply to non-governmental organizations/entities that have partnerships with federal agencies.

Conclusion

USET SPF supports WHCNA's efforts to provide recommended best practices to protect our sacred sites and Indigenous Knowledge. The adoption of guidance to educate federal agency staff, federal contractors, and the public on policies to protect sacred sites and Indigenous Knowledge is necessary and long overdue. This action better acknowledges and upholds federal trust and treaty obligations, and the diplomatic Nation-to-Nation relationship Tribal Nations have with the United States. Moving forward, we strongly recommend that WHCNA coordinate with the Office of Management and Budget and consult with

Tribal Nations on developing overarching federal guidance for the protection of sacred sites and Indigenous Knowledge to apply to all federal agencies. We look forward to continued dialogue on these important issues and anticipate further clarification and addition of language to the Draft Guide on Sacred Sites to further emphasize policies for the protection of Tribal sacred sites and Indigenous Knowledge. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal flourish extending to the right.

Chief Kirk Francis
President

A handwritten signature in black ink, appearing to read 'K. A. Carroll', with a long horizontal flourish extending to the right.

Kitcki A. Carroll
Executive Director